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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1045

STATE OF LOUISIANA,

Applicant,

versus

CHARLES NEWMAN,

Respondent.

APPLICATION FOR WRIT OF CERTIORARI
TO REVIEW FINAL JUDGMENT OF
THE SUPREME COURT OF LOUISIANA
IN
STATE OF LOUISIANA VS CHARLES NEWMAN

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PETITION FOR WRIT OF CERTIORARI

In accordance with Rule 23 of the Rules of the Supreme Court of the United States, the petition of the State of Louisiana respectfully represents:

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RULE 23 1. (a): Official citation to the report of the opinion of which review is sought is not yet known. The unofficial citation is *STATE OF LOUISIANA vs. CHARLES NEWMAN,* 283 So.2d 756 (1973). A copy of the opinion is appended hereto, in accordance with Rule 23 1. (i).

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RULE 23 1. (b): The grounds upon which the jurisdiction of this Court is invoked are:

(i): The judgment of which review is sought was entered on September 24, 1973, at approximately 10:00 AM.

(ii): Timely application for rehearing was made to the Supreme Court of the State of Louisiana, and was denied on October 26, 1973.

(iii): Jurisdiction for review of the final decision of the Supreme Court of the State of Louisiana is conferred by USCA 28:1257 (3), and is in accord with the provisions of Rule 19 1. (a) of the Rules of this Honorable Court.

RULE 23 1. (c): Questions for the Court's consideration depend upon the following facts, set forth in greater detail in Article 5 of this petition:

At approximately 4:00 AM on September 18, 1972, an intruder entered the residence of Mrs. E. R. Stinson, and got into bed with an eight year old and a thirteen year old girl. The thirteen year old (Alice Stinson) awakened and sat up in bed. The room was illuminated by light from the bathroom, which was immediately outside this bedroom.

When Alice Stinson sat up, the intruder got up from the bed, stated that he was leaving, went to the window, pulled out the screen and exited.

Alice Stinson went to her mother's room and reported the intrusion. The police were called, and, within seven minutes, the defendant herein was in custody. His description matched that given by Alice Stinson, and his physical condition was appropriate for a person running through this particular neighborhood in the dark. His automobile was found parked beside the Stinson residence, and he lied to the arresting officers about his business in the neighborhood.

Alice Stinson and her mother were taken to police headquarters by detectives. There, Detective Morgan attempted to calm her and to explain to her what took place in a line-up. His explanation included showing her the line-up viewing area.

Lt. Templin took the accused to police headquarters, and took him to his office preliminary to setting up a line-up. See the attached diagram for the relative locations of the offices of Lt. Templin, Det. Morgan and the line-up viewing area.

After speaking briefly with the accused, Lt. Templin started toward the jail, intending to put the accused into a white jail uniform before placing him and other similar looking persons in the line-up. At approximately the same instant, Det. Morgan, unaware of the approach of Lt. Templin and the accused, stepped out of his office with Alice Stinson to show her the line-up viewing area. Just as Alice Stinson entered the viewing area, Lt. Templin and the accused entered the line-up room. The accused was immediately identified by

Alice Stinson as the person she had seen in her bedroom.

Det. Morgan returned Alice Stinson to his office, and then advised Lt. Templin of what had happened. Lt. Templin determined in his own mind that the line-up was then useless, and cancelled it. However, he also concluded that the identification made by Alice Stinson would not be admissible in evidence, and ordered that no mention be made of it in the reports sent to the District Attorney.

The Assistant District Attorney handling the case did not learn of this identification until trial. The matter was taken to trial as a wholly circumstantial case, with no knowledge that the young witness could identify the accused. Defense counsel also contends that he did not know of the events at police headquarters.

At trial, Alice Stinson identified the accused in court. Then, on cross-examination, she told of the events at police headquarters. After this, defense counsel moved for a mistrial, basing his motion upon an allegedly unconstitutional identification procedure. The motion was overruled, and a Bill of Exception reserved to the ruling.

Lt. Templin was not available for trial, having just undergone major abdominal surgery. The defense had moved for a speedy trial, and, in order to avoid a continuance, stipulated the expected testimony of Lt. Templin. However, at the time the stipulation was prepared, neither defense counsel nor the Assistant Dis-

trict Attorney was aware of what had occurred at police headquarters. The stipulation therefore contained nothing of what Lt. Templin might have had to say about those events.

Det. Morgan testified as to what he knew of the events at police headquarters, both out of the presence of and in the presence of the jury, after which defense counsel again moved for a mistrial, urging the same grounds. Again, the motion was denied and a Bill of Exception reserved.

Following the close of testimony, defense counsel moved again for a mistrial or for instruction to the jury that all testimony relative to the identification of the accused should be disregarded. The motion was again denied, and the final Bill of Exception reserved.

The jury returned a verdict of Guilty, and the defendant was subsequently sentenced to serve seven years at hard labor. An appeal was perfected, ultimately resulting in reversal of the conviction and remand of the case for new trial. Rehearing, timely applied for, was denied by the Louisiana Supreme Court.

Complete details of the entire matter are set forth in Article 5 of this petition.

The questions for consideration by the Court are:

A. Is the State entitled to the protection of the 14th Amendment of the United States Constitution?

B. Do the facts of this case present a violation of the defendant's 14th Amendment protections?

C. Are the exclusionary rules of the *Wade-Gilbert-Stovall* trilogy applicable to this case?

D. Has the Louisiana Supreme Court properly interpreted and applied the *Wade-Gilbert-Stovall* decisions?

E. Has the Supreme Court of Louisiana, in violating state constitutional jurisdictional exclusions, denied the State 14th Amendment protections?

F. Has the Supreme Court of Louisiana, in ignoring state statutory mandates, denied the State 14th Amendment protections?

G. Is the state statutory mandate above mentioned in accord with expressions in the *Wade-Gilbert-Stovall* cases?

H. Assuming *arguendo* that a new trial is required, must the identification testimony necessarily be excluded?

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RULE 23 1. (d): Applicable provisions of law are:

A. USCA 28:1257

> "Final judgments or decrees rendered by the highest court of a State in which a decision

could be had, may be reviewed by the Supreme Court as follows:

* * *
* * *

(3) By writ of certiorari, ... where any ... right, privilege or immunity is specially set up or claimed under the Constitution ... of ... the United States."

B. Rule 19 of the Rules of the Supreme Court of the United States

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

C. LSA Constitution, Article 7, Section 10.

"Supervisory, Original and Appellate Jurisdiction. . . . In criminal matters, its appellate jurisdiction extends to questions of law only."

D. LSA Code of Criminal Procedure, Article 921.

> "A judgment or ruling shall not be reversed by an appellate court on any ground unless in the opinion of the court after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

E. The decisions of this Court in *United States v. Wade*, 388 US 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Gilbert v. California*, 388 US 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178; and *Stovall v. Denno*, 388 US 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

RULE 23 1. (e) STATEMENT OF THE CASE

At approximately 4:00 AM on September 18, 1972, an unknown Negro male entered the residence of Mrs. E. R. Stinson, located at 2540 Dupont Street, Shreveport, Caddo Parish, Louisiana, and got into bed with 13 year old Alice Stinson and her eight year old sister. Alice woke up and saw the man by the light from the bathroom, which was immediately outside her bedroom. Alice testified at trial that this light was sufficient for her to see (Record, Page 46). This was not a night light, but a regular light (Record, Page 47).

Alice Stinson sat up in bed, and the Negro then got up and moved against the wall (Record, Page 45),

where he said to her, "Don't scream, I'm leaving" or words to that effect (Record, Page 45). He then went to the window, tore open the screen and exited the house (Record, Page 47).

Alice then informed her mother, who was in another bedroom. Her mother telephoned the Shreveport Police Department and reported the break-in. Police dispatched patrol cars to the area by radio, and within seven minutes the accused was in custody.

Alice had given the police a brief description of the intruder, saying that he was a tall Negro with an "Afro-bush" haircut and a goatee, slim in build, and wearing black undershorts. At the time Charles Newman was apprehended, he fit this description perfectly but was wearing trousers over his black undershorts and was carrying his shirt in his hand.

Newman was apprehended within one block of the Stinson residence, and, at the time, he was covered with bits of grass, leaves and dirt, and had numerous small scratches on his person. The neighborhood in which this offense took place is characterized by numerous hedges and fences and uneven ground, which makes Newman's appearance appropriate for one attempting to flee through this neighborhood at night. He was also perspiring heavily.

When caught, Newman told police officers that his automobile had run out of gas. The officers located his automobile parked beside the Stinson residence.

After locating the keys, which were found on the ground beside the vehicle, the officers found that the automobile had ¼ of a tank of gas and that it started easily.

Alice and her mother were taken to police headquarters in one patrol car, and Newman was transported there in another. They did not meet during this time.

At headquarters, Lt. Templin took Newman to his office for an interview and to explain to him about the line-up. Det. Morgan took Alice and her mother to his office for similar purposes. They still had not encountered the accused.

Alice Stinson was very apprehensive about the line-up, but after some explaining by Det. Morgan, she began to calm down. Det. Morgan then decided to show her the line-up viewing area, and explain to her that persons in the line-up room would not be able to see her. The viewing area is just a couple of steps from Det. Morgan's office.

Meanwhile, Lt. Templin had finished interviewing Newman, and determined to take Newman to the jail. There, he was to change into a white jail uniform, and then return to the line-up room, with other persons of similar appearance. Lt. Templin and Newman left Lt. Templin's office, proceeding to the jail.

Across the hall from Det. Morgan's office is the Detective Office coffee bar. This closet-like area also contains the line-up viewing window. On the other side

of the wall is the Detective Office Conference Room, which also serves as the line-up room. The diagram appended hereto shows the setup, as well as the location of the offices involved and the routes taken by the parties.

Det. Morgan stepped out of his office with Alice, and entered the viewing area. He had just begun explaining to her about the one-way glass in the window when Lt. Templin and Newman entered the conference room. Alice Stinson immediately identified Newman as the person she had seen in her bedroom. Her testimony (Record, Pages 49 and 50) on cross examination clearly shows that this identification was spontaneous on her part, immediate, and without any prompting or questioning on the part of the police. She also states that it was just a little while after the accused was in her house (Record, Page 52).

There is testimony in the record that indicates that Newman had been pointed out to Alice by her mother on the occasions prior to the commencement of the trial when all had been in court. However, a reading of that part of the cross-examination (Record, Pages 54 and 55) clearly show that the witness was referring to discussions between herself and her mother. Nothing therein indicates that she did not first point out Newman to her mother, or that her sole recognition of Newman was based upon her seeing him in court.

Later in the first day of trial, Det. Morgan testified as to his knowledge of the case. On cross-examination, he omitted certain details which, by then, were indicat-

ed to be within his knowledge. Therefore, on the second day of the trial he was recalled in order that the events at police headquarters might be clarified.

At this point, the Court is respectfully reminded that at the time Alice Stinson took the stand, neither defense counsel nor the Assistant District Attorney was aware of the events at police headquarters, or that Alice Stinson could identify the accused. Why this was not discovered prior to trial is not known, but the fact remains that it was not discovered until Alice Stinson identified the accused on direct examination and then related the events at police headquarters on cross-examination.

Detective Morgan related substantially the story of how the confrontation between Alice and the accused occurred, as stated herein (Record, Pages 65 through 71). This was out of the presence of the jury. Then, when the jury had returned to the courtroom, he again related these events (Record, Pages 77 through 84). Between these two segments of his testimony appears arguments of counsel and a ruling by the trial court to the effect that this was an accidental confrontation, that it was brought out in part before counsel for either side was aware of it, that it bears on the weight of the identification testimony, and that the jury was entitled to hear the whole story after having heard a part of it.

There is also testimony that would indicate that after the confrontation, the accused was more deliberately exhibited to the witnesses, and required to make cer-

tain statements. Newman himself so testified (Record, Page 90), as did Mrs. Stinson (Record, Pages 85 through 89). But a reading of Mrs. Stinson's testimony on this point clearly shows that if this did in fact occur, she and her daughter were paying little or no attention to it. And Det. Morgan's testimony (Record, Pages 79 and 80) shows that he had taken Alice back to his office immediately after she made the identification. What actually took place inside the conference room is shown by Det. Morgan's testimony at Page 81 of the Record — When Lt. Templin first took Newman to his office, Newman's personal effects were placed on the conference room table. When Lt. Templin came back through the conference room, he stopped at the table to return Newman's personal effects to him. Newman was not being exhibited to the witnesses — he was putting his things back into his pockets.

All of these matters were before the jury, and defense counsel very competently argued these matters to the jury after the close of testimony; but the jury, after lengthy deliberations, returned a verdict of Guilty.

During the course of the trial, defense counsel had reserved four Bills of Exception. The first is not involved in this application. The second, third and fourth Bills all relate to the issues presented herein, and were treated together by the Louisiana Supreme Court. It was upon these three Bills that the Louisiana Supreme Court based its reversal of the conviction, finding that the identification testimony violated the 14th Amendment rights of the accused.

A reading of the opinion of the majority of the Louisiana Supreme Court discloses that the majority is of the opinion that the 14th Amendment protects an accused from accidental violations of his rights (Page 2 of the opinion, footnote #1). Further, the opinion clearly discloses that the Court reviewed the facts surrounding the identification and then concluded that, "It is hardly possible that this in-court identification of the defendant could have a source independent of the show-up at the police station and the subsequent instructive courtroom encounters." (Opinion, Page 6).

After receipt of a copy of this opinion, the State immediately made application for rehearing, pointing out the violations of State statutory and constitutional mandates, and urging the misinterpretation and misapplication of the rulings of this Court in the *Wade-Gilbert-Stovall* cases. However, it was not until the Louisiana Supreme Court denied the rehearing that the State was then without remedy within the State system. Since the delivery of the Louisiana Supreme Court's opinion was the State's first notice that the Court would ignore State constitutional and statutory provisions, and since these matters were urged in the State's application for rehearing, the issues were timely raised and are presented here at the proper time.

RULE 23 1. (f): STAGING OF THE FEDERAL QUESTION

A. Defense Bill of Exception #2 appears at Page 39 of the Record, followed immediately by the transcript of testimony relating to that Bill. Bill #3 begins at Page 91 of the Record, and is followed by the tran-

script of testimony relating to it. Bill #4 begins at Page 143 of the Record, and is also followed by the transcript of testimony relating to it. All three Bills and the testimony relating to them are needed for the Court's consideration of the questions raised by the State in this application. However, to conserve the Court's time, it should be noted that the testimony appended to the Bills is the same, and a reading of the testimony to any one of them will suffice.

B. The State's first notice that the Louisiana Supreme Court would ignore its constitutional prohibition against appellate review of fact was upon receipt of a copy of the Court's opinion in the case. At that point, the State had fifteen days within which to seek relief through State procedures, and it did so by timely filing an application for rehearing. The State's remedy was denied, thus setting the stage for this application, because the denial left the State without an avenue for relief within the State structure.

Since the constitutional provision withholds jurisdiction to review fact, and since the Louisiana Supreme Court did in fact make a review of facts which had been before the jury, and since the State has no avenue of relief within the State system following the denial of a rehearing, the denial of the rehearing deprives the State of the protections of the 14th Amendment.

C. Similarly, when the Louisiana Supreme Court ignored the statutory mandate to apply the harmless error doctrine, and denied a rehearing, it likewise denied the State the protections of the 14th Amendment.

D. Finally, in misinterpreting and misapplying the rulings in the *Wade-Gilbert-Stovall* cases, the Louisiana Supreme Court has committed error that is contemplated by USCA 28:1257 and Rule 19 of the Rules of this Court. This error was first discovered by the State upon receipt of the Louisiana Supreme Court's opinion, and was urged in the State's application for rehearing.

RULE 23 1. (h) ARGUMENT

MAY IT PLEASE THE COURT:

A. IS THE STATE ENTITLED TO THE PROTECTION OF THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION?

A quick reading of the 14th Amendment gives the first impression that the State is not a citizen within the meaning of the amendment, and is therefore not entitled to its protection. However, artificial entities have, in proper cases, been granted the protections of this and, through this, other amendments to the constitution. It is submitted that the State should be accorded the same rights.

However, there is a greater reason for finding that the State is entitled to the protection of the 14th Amendment in this case. The State is not actually the real party in interest, but acts in a representative capacity. Were it not for the affects of crime upon the people of the State, crime would have no affect upon the State and the State would therefore have no interest in crime prevention, detection or punishment. It is the fact that

crime affects the citizens of the State, together with the fact that these affects are indirectly transmitted to the State that gives rise to a duty and an interest in the State to prevent, detect and punish crime. Therefore, although State statute requires that criminal prosecutions be brought in the name of the State, this is a mere formality; and the real parties in interest are the citizens of the State. Those citizens are citizens of the United States, and are entitled to the protections of the 14th Amendment as much as is a defendant. To deny them relief in this case merely because their action is brought in the name of the State of Louisiana is in and of itself a deprivation of 14th Amendment protections by the State Supreme Court and 5th Amendment rights by this Court. In a situation such as this, equal protection of law and due process of law demand that the State have the same right to relief from error that is accorded to the defendant.

Had the defendant been acquitted, the Louisiana Supreme Court would not have made a factual review of the case and entered judgment of guilt. Such an action would not only violate the State constitutional prohibition against appellate review of fact, but would also violate the defendant's rights under the 14th and 5th Amendments. For the State Supreme Court to make a factual review in this case, and for the State to find itself without relief because the State Supreme Court refuses to recognize that it has no jurisdiction to review facts that were before the jury is a flagrant denial of equal protection of law. The citizens of the State of Louisiana are entitled to that protection without qualification.

B. DO THE FACTS OF THIS CASE PRESENT A VIOLATION OF THE DEFENDANT'S 14th AMENDMENT PROTECTIONS?

This question strikes directly at the comment of the Louisiana Supreme Court in footnote #1 in its opinion (Page 2 of the Opinion). The Court held that due process protects an accused from accidental violations of his rights. But what the Court failed to note and refused to recognize is that in a case such as this there is no violation of due process of law.

It is conceded here, as it was on oral argument before the Louisiana Supreme Court, that had this been a staged confrontation, deliberately planned and set up by the police, the fact of the identification at police headquarters would be inadmissible at trial under certain of the rulings of this Court. But in imposing a *per se* exclusion in such cases, the reason is not that the identification is necessarily unreliable but rather that there has been police misconduct in deliberately setting up an unnecessarily suggestive identification procedure that may well result in a mistaken identification. The exclusionary rule is aimed at preventing police from setting up such identification procedures, not at excluding a necessarily unreliable identification.

If the rule was aimed merely at the possibly mistaken identification, such encounters would not be excludable *per se*. It would be sufficient to show that the witness' identification of the accused in court was not based upon the faulty procedures at the prior encounter.

The reason that one-on-one identifications are not favored is that there is the chance of mistaken identification. Of course, even when a thoroughly proper line-up is conducted, there is still a risk of mistaken identification, but apparently the courts of this country are more willing to accept such identifications when the witness selects the accused from a group of similar looking people. Still, where the people in a line-up do look fairly similar, it would appear that there is an even greater risk of mistaken identification. Suppose that there were two persons in the line who had no alibi for the date and time in question, and the witness selected the wrong one? Putting the issue in that light, would not one-on-one identifications then seem the preferable manner of selection?

At any rate, it is clear that the *per se* exclusions in one-on-one cases are aimed not at the identification itself, but at preventing a practice by the police which the courts feel may result in faulty identifications. The *per se* exclusion, therefore, does not apply where there has been no police misconduct. The defendant is not necessarily denied due process of law merely because he was identified by the witness in a one-on-one confrontation.

Since the incident related in the instant case was purely a matter of chance, it is clear that there was no police misconduct involved in the incident, at least insofar as the identification itself is concerned. Suppression of the identification from the police reports may have been misconduct, but if so, it has no bearing on the *fact* of the identification. Nor does it bear on the reliability of the identification.

This identification came spontaneously and immediately from the witness at a time when it could well be found to have been within the res gestae of the case. And had the accused been taken immediately to the Stinson residence for identification purposes, the identification would have been admissible. There is no significant difference between immediate identification at the scene and immediate identification at the police station.

Finally, the identification took place at the whim of fate. This simply does not amount to a violation of due process of law. A violation of due process of law requires an affirmative action on the part of the officials handling the case, and cannot occur when there is no such act. Due process of law must recognize that fate may indeed be the sole reason that a criminal may be apprehended, and cannot require that the offender's identification by a victim must be suppressed merely because it did not occur during the course of a completely proper line-up procedure. To rule that an accused is protected from accidental confrontations with witnesses would be to rule that a burglar, acting at night at a business establishment normally closed at the time, would be protected from in-court identification by a passer-by who just happened to see the burglar. Such a ruling would be the logical extension of the ruling of the Louisiana Supreme Court in this case — i.e., that the burglar could not be identified by anyone who saw him at a time when he was without counsel and not in a proper line-up.

The footnote statement of the Louisiana Supreme Court, to the effect that due process protects an accused from "accidental" violations may be semantically correct; but the use of the word "violations" in the sentence, in the sense obviously intended, is inappropriate to this case. There was an accidental confrontation, true, but that confrontation did not produce a *violation* of due process of law.

C. ARE THE EXCLUSIONARY RULES OF THE *WADE-GILBERT-STOVALL* TRILOGY APPLICABLE TO THIS CASE?

In *Wade* and *Gilbert*, line-ups were striken down because of the failure of the police to notify defense counsel of the line-ups. It also appears that there were some elements of unnecessary suggestiveness involved in the cases. But these line-ups were held at a time when the formal charge had already been filed in court and defense counsel already at work on the case. The presence of counsel at those line-ups would have afforded the accused persons some degree of protection from the suggestive procedures employed. However, in *Simmons v. U.S.*, 390 US 377, 88 S.Ct. 967 (1968), the Court clearly indicated that *Wade* and *Gilbert* are not applicable to pre-indictment line-ups. Thus, the mere fact that Newman did not have counsel at the time he was identified does not necessarily bring the exclusionary rules into play in his case.

Further, in *Wade* and *Gilbert*, line-ups were actually held. Not so in the instant case. Preparations were being made to hold a line-up; but because of the intervening events, it was not held.

A similar, although not identical, situation is presented in *Coleman v. Alabama*, 399 US 1, 90 S.Ct. 1999 (1970). There, line-up preparations had reached a more advanced state than in the instant case. The persons who were to stand in the line were being brought on stage, and the witness was in place in the viewing area. As Coleman stepped into view, the witness immediately and spontaneously identified him, without waiting for the other persons to appear or for any of them to reach their assigned stations on the stage. That case was ultimately reversed, but not because of a defective line-up. It was reversed because the accused was not represented at a preliminary hearing.

A more closely related situation appears in *U.S. v. Pollack*, 427 F.2d 1168 (5th Cir., 1970), in which the 5th Circuit cited *Simmons* and several of its own opinions in finding that a witness who had accidentally confronted the accused in the courthouse hallway on the day of the trial could make a constitutionally valid in-court identification during the trial.

In the instant case, the identification took place before the officers had a reasonable opportunity to secure counsel for the defendant, within a few minutes of the commission of the offense, accidentally, without design or plan on the part of the police, before the officers were reasonably able to set up a proper line-up. The case simply does not fall within the exclusionary rules set out in *Wade* and *Gilbert*. But what about *Stovall*?

The heart of the *Stovall* decision was "unnecessarily suggestive" identification procedures. Any one-on-one

identification procedure will have some element of suggestiveness to it; but, when circumstances have prevented more persons from appearing in a line-up with the suspect, the courts have permitted the one-on-one identifications. It is therefore clear that the key to the phrase is the word, "unnecessarily". In cases where the suggestiveness was unavoidable, the identifications were permitted.

In the instant case, there was no opportunity to avoid the one-on-one confrontation because no one knew it was going to take place. At the time the confrontation took place, the police were attempting to set up a proper line-up. Certainly this shows that the confrontation did not take place as the result of some plot on the part of the officers. Therefore, any suggestiveness involved was clearly not "unnecessary".

But was it really even that suggestive? The witness had been told by Det. Morgan what to expect *when the line-up was held.* Her testimony, toward the bottom of Page 49 of the Record, clearly shows that she was expecting a number of people to be brought in. Det. Morgan's testimony shows that at the time of the confrontation the line-up had not yet been set up. He was showing the witness the viewing area. No one was expecting the accused to be in the room. No one asked Alice Stinson if she recognized the accused. No one pointed him out to her. She simply identified him at first sight.

The significant point is that no one knew the accused would come through the room. The person seen by

the witness could easily have been some other person arrested on that morning, and Alice Stinson probably would not have identified him. But an accident of fate put the accused before the witness, and she immediately identified him. Aside from the fact that Newman was the only black person in the room, and that there were police officers in the room, there was nothing here that suggested to Alice Stinson that this person was the one who had been in her bedroom. Nothing, that is, except her memory of the intruder.

Clearly, then, *Wade-Gilbert-Stovall* rules do not apply to the instant case.

D. HAS THE LOUISIANA SUPREME COURT PROPERLY INTERPRETED AND APPLIED THE *WADE-GILBERT-STOVALL* DECISIONS?

As pointed out above, *Wade-Gilbert-Stovall* do not apply at all to the instant case. The error of the Louisiana Supreme Court lies in their finding that due process of law protects an accused from this sort of situation, and then misreading *Wade-Gilbert-Stovall*. *Wade-Gilbert-Stovall* all deal with intentional actions on the part of the police, and those actions did result in violations of the provisions of the 14th Amendment. But an *accidental* confrontation does not produce a violation. Therefore, the Louisiana Supreme Court has misinterpreted the rulings of *Wade-Gilbert-Stovall*, and, because of the misinterpretation, misapplied those decisions. They simply do not fit the instant case at all.

E. HAS THE SUPREME COURT OF LOUISIANA, IN VIOLATING STATE CONSTITUTIONAL JURISDICTIONAL EXCLUSIONS, DENIED THE STATE 14th AMENDMENT PROTECTIONS?

Obviously the 14th Amendment would protect an accused from such a gross violation of due process of law as the trying of the accused in a court that was without jurisdiction in the case. The Louisiana Supreme Court would not hesitate to strike down such a conviction and set aside the sentence. Are not the people of the State entitled to the same protection as plaintiff that they would be afforded as defendant? To hold otherwise would be a denial of equal protection of the law.

In the instant case, the Louisiana Supreme Court had before it a case in which the trial jury was fully informed during the trial, by the testimony of competent and unimpeached witnesses, as to *all* facts and circumstances surrounding the in-court identification of the accused by the witness. The jury was totally aware of the confrontation at police headquarters, and of the fact that the witness and her mother had discussed the identity of the accused at the four prior appearances in court. After the close of testimony, these facts were argued by defense counsel, with great emphasis upon the possibility of mistaken identification due to the confrontation and the court appearances. Finally, they were properly instructed by the trial judge relative to the weight to be given the evidence. Circumstantial evidence as well as direct evidence was explained by the court, and the jury was fully instructed that it was the judge of the facts and

that it could assign great, little or no weight to any or all evidence as it felt was proper. The jury then returned a verdict of Guilty, and the Louisiana Supreme Court reviewed its finding of fact. Such a review is expressly denied to the Supreme Court in the constitutional provision which sets out its appellate jurisdiction. And this was no situation in which a factual determination was necessary first, and then a ruling of law made to depend upon it. A mere reading of the Court's opinion clearly shows that the Court did review the facts of the identification and did reach a factual conclusion that the in-court identification "could not possibly" have a basis independent of the confrontation and courtroom visits. This violation of the Court's jurisdictional authority deprives the State of its rights, and renders the Court's judgment null and void. This Honorable Court should so find, and reinstate the conviction and sentence of the First Judicial District Court of Louisiana.

F. HAS THE SUPREME COURT OF LOUISIANA, IN IGNORING STATE STATUTORY MANDATES, DENIED THE STATE 14th AMENDMENT PROTECTIONS?

The State of Louisiana, in Article 921 of its Code of Criminal Procedure, commands the application of the doctrine of harmless error. The Article clearly states that no judgment or ruling shall be reversed unless the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused or constitutes a violation of constitutional or statutory rights.

We have already shown that there is no violation of constitutional dimensions involved in this case. Nor is there any statute operating in favor of the accused which has been violated. The sole remaining question, then, is whether the alleged error has probably resulted in a miscarriage of justice. For purposes of this portion of the argument, we will assume that the identification testimony was error.

The State's case, going into the trial, was based entirely upon circumstantial evidence. The State was not aware that Alice Stinson would be able to identify the defendant in court, and did not know that she had done so at police headquarters. But the State did have a very strong circumstantial case. At trial, the State proved the following facts:

1. An unauthorized entry occurred at the Stinson residence at approximately 4:00 AM on the date in question.

2. The intruder was a Negro male with a short Afro-bush haircut, slim in build, with a goatee beard, wearing black undershorts.

3. In Louisiana, Simple Burglary is an unauthorized entry with intent to commit any felony or any theft. The State's case was based upon an intent to commit a felony. Evidence of that intent was that the intruder was clothed only in undershorts, and that he got into bed with two young girls. Under Louisiana law, any sex offense with either of these girls would have been a felony.

4. The neighborhood is a white residential area, with no Negro residences nearby.

5. The accused was captured in this neighborhood within seven minutes of the report of the break-in.

6. At the time of his arrest, the accused was wearing trousers and black undershorts, and was carrying his shirt in his hand.

7. The accused had scratches, leaves, dirt and perspiration all over him when he was apprehended.

8. The accused was running when apprehended.

9. His physical appearance was appropriate for one who had been attempting to flee through this particular neighborhood at night.

10. The accused is a Negro male with a short Afro-bush haircut and a goatee beard, and is slim in build.

11. His automobile was located immediately outside the Stinson residence.

12. He attempted to explain his presence in the neighborhood by telling the officers that his automobile had run out of gas. It contained ¼ of a tank when checked by the officers.

The State was confident that with this evidence it would obtain a conviction, even though there was no eyewitness identification of the accused. This evidence

is clearly sufficient to sustain a conviction by itself. It therefore cannot be said that the conviction rested solely upon the in-court identification of the accused nor upon the identification of the accused at police headquarters. In fact, since no one knows what the jury actually considered, or what weight, if any, it assigned to the identification testimony; it is only rank speculation that leads the Louisiana Supreme Court to conclude that the conviction rested upon that testimony alone.

It is therefore abundantly clear that even *if* the identification testimony was error, the error was harmless because the jury had far more than sufficient evidence upon which to base a conviction than was needed, without even considering the identification testimony.

The matter of harmless error was urged at the appeal, and was again urged in the application for rehearing. State statute compels the application of the doctrine. The Louisiana Supreme Court has never failed to apply the doctrine when it operated in favor of the accused. Its failure and refusal to even *consider* this case in light of the doctrine is a denial to the people of Louisiana of the equal protection of law. This Honorable Court should so find, and should reinstate the conviction and sentence rendered in the trial court.

G. IS THE STATE STATUTORY MANDATE TO APPLY THE HARMLESS ERROR DOCTRINE IN ACCORD WITH EXPRESSIONS IN THE *WADE-GILBERT-STOVALL* CASES?

This Court, in *Wade*, 388 US at 242, 87 S.Ct. at 1940, clearly indicated that the doctrine should apply, when it ordered a hearing held to determine whether the identification therein involved had an independent basis, or ". . . whether, in any event, the introduction of the evidence was harmless error. . . ." In *Gilbert*, 388 US at 272, 87 S.Ct. at 1956, similar language is found. There appears to be nothing in *Stovall* that would deny the applicability of the doctrine.

H. ASSUMING *ARGUENDO* THAT A NEW TRIAL IS REQUIRED, MUST THE IDENTIFICATION TESTIMONY NECESSARILY BE EXCLUDED?

In both *Wade* and *Gilbert*, this Court ordered hearings held to determine whether the identifications had an independent basis. In those cases, there was a planned suggestiveness to the line-ups. If such possible error may be cured by proof of an independent basis for recognition of the accused, certainly such could be done in a case of accidental confrontation.

There is, in the testimony of Alice Stinson and Det. Morgan, a clear indication that Alice recognized the accused upon an independent basis. The very speed and spontaneity of her identification of the accused at police headquarters shows that she recognized him at that time from her own memory of him in her bedroom. No one indicated to her that this was the accused, nor did anyone ask her if she recognized the man in the room. She identified him, of her own volition, as soon as he came into sight.

Alice's testimony on cross-examination indicates that she and her mother discussed the identity of the accused while in the courtroom on four occasions prior to the commencement of the trial. Alice even responded in the affirmative when defense counsel asked if her mother had ever pointed out the accused to her. Unfortunately, during the unexpected discovery of the witness' ability to identify the accused, and the discovery of the events at police headquarters, the question of the independent basis was not completely developed. What is lacking is the answer to the question, "Did Alice first point out the accused to her mother?" and to the question, "Did Alice already know that this was the person when her mother pointed him out in the courtroom?" An affirmative answer to either of these questions would again show that her identification of the accused in court rested upon sound ground.

Therefore, in the event that this Court feels that a new trial is proper, the State urges that the evidence excluded by the Louisiana Supreme Court should be admissible at that trial if there is a more detailed showing of the reliability of the identification testimony.

CONCLUSION

The State of Louisiana, in prosecuting crime in its name, acts only as a representative of the people of the State. Those people are citizens of the United States, and are entitled to the rights, privileges and immunities protected by the 14th Amendment of the United States Constitution. They have been denied equal protection of law and of due process of law by

the actions of the Louisiana Supreme Court in its taking of jurisdiction where that is expressly denied to it and by its refusal to follow statutory mandates of the Louisiana Code of Criminal Procedure.

Further, the Louisiana Supreme Court has decided an issue previously decided by the United States Supreme Court, and has rendered an opinion that is not in accord with the decisions of the United States Supreme Court. In so doing, it incorrectly interpreted the *Wade-Gilbert-Stovall* cases, found them to be applicable to the instant case, and then relied upon them to reverse the conviction in the instant case.

In committing these three errors, the Louisiana Supreme Court has deliberately and effectively denied the citizenry of the State of Louisiana due process and equal protection of law, and have deprived them of a valid and lawful conviction of a violator of Article 62 of the Louisiana Criminal Code. Their judgment in this matter should be found null and void because it is based upon an unlawful seizure of jurisdiction, and because it is not in accord with prior decisions of this Honorable Court. The remedy is for this Honorable Court to set aside the judgment of the Louisiana Supreme Court and to reinstate the judgment of the First Judicial District Court of Louisiana.

WHEREFORE: Petitioner prays that this petition be considered by the Court, and, due proceedings had, that there be judgment in favor of Petitioner, setting aside the judgment of the Louisiana Supreme Court and reinstating the conviction and sentence rendered herein in the First Judicial District Court of Louisiana.

Alternatively, and only in the event that a new trial is deemed necessary by this Court, Petitioner prays that there be judgment permitting the use of the identification testimony upon a showing of its reliability.

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SUPREME COURT OF LOUISIANA

No. 53422

STATE OF LOUISIANA

versus

CHARLES NEWMAN

Monday, Sep. 24, 1973

Appeal from the First Judicial District Court
for the Parish of Caddo, Louisiana.
Honorable William J. Fleniken, Judge.

DIXON, Justice

Charles Newman was charged and convicted of simple burglary and was sentenced after a trial by jury to serve seven years at hard labor. Four bills of exceptions were perfected.

At approximately 4:00 a.m. on September 18, 1972 illegal entry was made into the residence of Mrs. E. R. Stinson in Shreveport, Louisiana. The burglar was seen by thirteen year old Alice Stinson who was in bed with her eight year old sister. Alice was aroused from her slumber and in the partially illuminated room saw a black man clad in black undershorts sitting on the bed. She sat up and started to scream when the intruder said words to the effect, "Don't scream, I'm

leaving." The Negro male left through a window, and Alice ran into her mother's bedroom. Mrs. Stinson contacted the Shreveport police department.

Alice Stinson and her mother were taken to headquarters on the night in question and efforts were made to conduct a line-up. The young girl was visibly upset and did not want to take part in the procedure. Detective Morgan attempted to calm her down and allay her fears by explaining the nature of a line-up. He took the crying child into a viewing area to show her the one-way glass. Simultaneously, Lieutenant Templin, ignorant of the presence of Detective Morgan and Miss Stinson, came into the conference room with the defendant in custody to prepare for the line-up. The child immediately identified the defendant and resumed crying. This incident was not placed in the police report and was only uncovered on cross-examination of the witnesses. On direct examination by the district attorney, one of the detectives explained that the incident was omitted from the report because he "didn't see how it could be used" because of its prejudicial nature. The State did not attempt to use the out-of-court identification, but did rely on an in-court identification made by the young Stinson girl.[1]

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[1]In argument the assistant district attorney states that if this identification procedure were intentional, it would be unconstitutional, but not so, if accident. We consider that the defendant is protected from both intentional and "accidental" violations of his rights to due process.

Bill of Exception No. 1

This bill was reserved when the trial judge refused to grant a mistrial based upon the hysterical outburst of the Stinson girl during the course of the trial. The defendant alleges that the child's crying while saying "he broke in" was unresponsive to the questions and unduly prejudicial. This contention is rejected since unsolicited statements and spontaneous conduct of a witness are not usually grounds for a mistrial. C.Cr.P. 770, 775; State v. Jones, 263 La. 1012, 270 So.2d 489 (1972); State v. Callihan, 257 La. 298, 242 So.2d 521 (1970). The judge stated on refusal of the motion that the crying was not unexpected by the jurors in light of the age of the witness and the circumstances, and that in all probability it would happen again should the case be retried. The denial appears to be proper.

Bills of Exceptions Nos. 2, 3, 4

The grounds for all three bills are identical and are founded upon the district court's failure to grant a mistrial or to instruct the jury to disregard the identification testimony because of the prejudicial nature of the showup. An examination of the testimony shows that the thirteen year old girl had only viewed the burglar for a few seconds. The bedroom was dark with the only light emanating from a nearby bathroom where the door was partially closed. She had awakened from a sound sleep and was visibly upset. Detective Morgan testified that Miss Stinson was still crying upon her arrival at the police station, and that when the chance confrontation occurred she became almost hysterical again.

Due process prohibits the conduct of an identification procedure in a manner that is unnecessarily suggestive and conducive to irreparable mistaken identification. Neil v. Biggers, 41 L. W. 4064 (1972); Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877 (1972); Foster v. California, 394 U.S. 440, 89 S.Ct. 1127 (1969). In a determination of whether an identification procedure was impermissibly suggestive, reference must be made to all the circumstances. State v. Amphy, 259 La. 161, 249 So.2d 560 (1971); Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999 (1970); Foster v. California, supra; Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967). The record indicates that the confrontation at the police station was accidental. Nevertheless, one-on-one identification procedures are not favored. Foster v. California, supra; Stovall v. Denno, supra.

Exceptions are recognized to the general prohibition against one-on-one identification procedures. Stovall v. Denno, supra. One exception permits a one-on-one confrontation between an accused in custody and a witness where the accused is apprehended within a relatively short time and is returned to the scene of the crime for on the spot identification. In State v. Bland, 260 La. 153, 255 So.2d 723 (1971), this procedure was approved where the accused was returned to the scene fourteen hours after commission of the offense, but it should be noted that the court found the in-court identification to be based on an independent source even if the out-of-court identification was tainted.

The instant case does not properly fit within the exception. The accused was at the police station. The

witness was at the station. All the facilities to conduct a full-fledged line-up were available and should have been used.

Even if the out-of-court identification was tainted, if the in-court identification had a source independent of the out-of-court identification, the in-court identification does not violate defendant's due process rights. State v. Amphy, supra; State v. Richey, 258 La. 1094, 249 So.2d 143; U. S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967). A determination of whether the witness's in-court identification was based on an independent source seems to involve three factors:

1. The prior acquaintance of the witness with the accused. State v. Rose, 271 So.2d 863 (1973); State v. Jackson, 259 La. 957, 254 So.2d 259 (1971).

2. Length of time the witness observed the perpetrator before, during and after commission of the offense. State v. Hall, 261 La. 777, 260 So.2d 913 (1972); State v. Pierre, 261 La. 42, 259 So.2d 6 (1972); State v. Richey, supra; State v. Amphy, supra; State v. Pratt, 255 La. 919, 233 So.2d 883 (1970).

3. The circumstances under which the observation was made. See, generally, the cases cited in the preceding paragraph. This consideration should include illumination at the scene, the physical capacities of the witness, and the emotional state the witness was in at the time of observation.

In the instant case, the witness did not know the accused. She had an opportunity to observe the person who entered her room for only a brief period. The illumination in the room was slight, being provided by a light in a room down the hall with a partially opened door. The witness had just waked from a sound sleep. She was young and apparently in a state of severe emotional distress. The description she furnished was sketchy; tall, black, wearing black underwear.

On four subsequent occasions, when the case was fixed for trial and, at the request of the State, was continued, the mother of the identifying witness pointed the accused out to her daughter in the courtroom and stated "that's the man." It is hardly possible that this in-court identification of the defendant could have a source independent of the showup at the police station and the subsequent instructive courtroom encounters.

This identification procedure violated the defendant's due process rights. The in-court identification should be excluded. Bill No. 2 was taken when a motion for a mistrial or instruction to the jury to disregard the testimony of Miss Stinson concerning the identification of the accused was denied. Bill No. 3 is merely a reiteration of Bill No. 2. Bill No. 4 was reserved when a motion to instruct the jury to disregard the testimony of any person concerning any identification associated with the so-called line-up was denied. All three bills have merit.

The conviction and sentence are reversed and set aside, and the case is remanded for a new trial consistent with this opinion.

SANDERS, Chief Justice (dissenting).

In this case, the police brought the defendant into the Conference Room at Police Headquarters, unaware of the presence of the victim. Upon seeing the defendant, the victim spontaneously identified him. The identification was in no way prompted or inspired by members of the police department. This spontaneous reaction by a young girl, who had only shortly before been victimized, is an example of *res gestae* under our jurisprudence. See State v. Reese, 250 La.151, 194 So.2d 729, cert. den. 88 S.Ct. 485. It does not taint the subsequent identification, since it is itself admissible as evidence.

In State v. Kirklan, 260 La.1011, 257 So.2d 693 (1972), this Court affirmed a conviction after an in-the-field identification by the victim, holding:

> ". . .[A] criminal suspect may be apprehended so close in proximity to time and place of the crime itself that the exigencies of the situation make it neither practical nor necessary to afford counsel for an in-the-field identification. State v. Richey, 258 La.1094, 249 So.2d 143 (1971); State v. Amphy, 259 La.161, 249 So.2d 560 (1971). Neither U.S. v. Wade, 388 U.S.218, 87 S.Ct.1926, 18 L.Ed.2d 1149, nor Gilbert v. State of California, 388 U.S.263, 87 S.Ct. 1951,

> 18 L.Ed.2d 1178 (1967) requires a contrary holding. There is no showing here that the procedure was conducted so unfairly or in such an impermissively suggestive manner as to amount to denial of due process of law."

Although the identification in Kirkland, supra, was an in-the-field one, the situation does not materially differ from the situation presented in this case. The cases of State v. Ash, 257 La.337, 242 So.2d 535 (1971) and State v. Amphy, 259 La. 161, 249 So.2d 560 (1971) — relied upon by the majority — set forth the same test for admissibility as State v. Kirklan, supra.

I find no violation of due process in the present case.

For the reasons assigned, I respectfully dissent.

MARCUS, Justice (dissenting)

I respectfully dissent. The out-of-court identification was accidental. Furthermore, the State did not attempt to use the out-of-court identification, relying on the in-court identification by the Stinson girl. The confrontation was accidental and should not be considered similar to the unfavored type of one-on-one identification procedure which might be unnecessarily suggestive. Even if the accidental confrontation created a tainted out-of-court identification, I feel that the in-court identification was valid. It was based upon the witness' independent observation while facing defendant as he sat on her bed on the night of the crime. I do not feel that defendant's constitutional right to due process has

been violated, and I disagree with the majority's conclusion that the in-court identification should have been excluded.

In my opinion, the conviction and sentence should be affirmed.

SUMMERS, Justice (dissenting).

I subscribe to the reasons assigned by the Chief Justice and Mr. Justice MARCUS in their dissents. I am convinced, moreover, that the in-court identification was based upon the thirteen-year-old girl's independent recollection of the defendant when she saw him on her bed the night of the crime. This independent recollection is dramatically illustrated by her spontaneous recognition of the defendant when he was accidently brought into her presence shortly after the crime was committed. No one asked her whether she saw anyone she recognized, defendant was not pointed out to her, nothing was done to suggest to her that the person brought into the conference room was the suspect in the break-in at her house. Insofar as any neutral observer was concerned, defendant could just as well have been any other person arrested by the police that night.

The real significance of this identification was that the young girl identified the defendant immediately upon seeing him, with no action on the part of the police to influence her. After this experience, and having seen him on her bed on the night of the break-in, there is no reason whatsoever to conclude that

she could not identify this same defendant at the trial regardless of what transpired in the interim.

It is stretching the point beyond tolerance to say that she didn't have an opportunity to observe him sitting on her bed. She was perceptive and alert enough to notice he had a short Afro haircut and black underwear, and to otherwise describe him to the police. Especially is her capacity to accurately observe confirmed when defendant was apprehended within minutes after the police cordoned off the neighborhood. He had an Afro haircut and he was wearing black underwear. And her powers of recall and observation were further confirmed when she so readily recognized the defendant shortly thereafter in the police station.

And this is not a case of conviction on the identification of the young girl alone. A host of facts and circumstances were established at the trial sufficient to establish the defendant's guilt beyond a reasonable doubt notwithstanding the girl's positive identification.

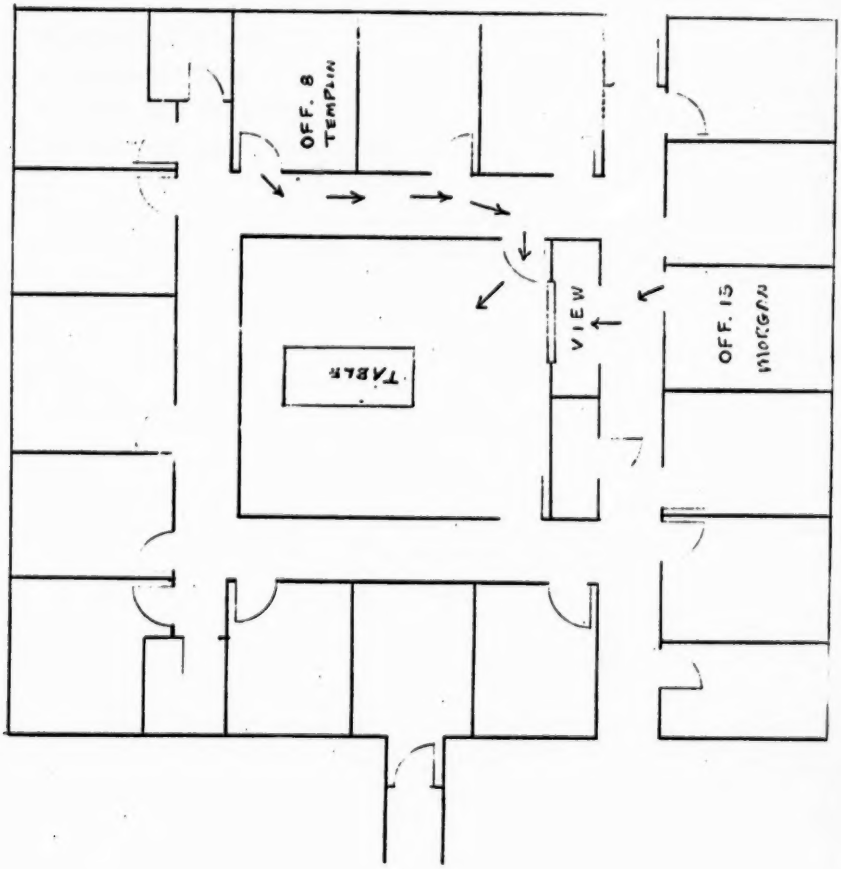
At approximately 4:00 a.m., September 18, 1972, a suspect entered the residence of Mrs. E. R. Stinson in Shreveport. The suspect was a Negro male with a short Afro type haircut, wearing black underwear. He got into bed with two juvenile girls, and when the older (13 years) awakened he left hurriedly.

The terrain in the neighborhood was uneven. Many fences and profuse shrubbery and bushy growth covered the area. Defendant was apprehended in the immediate neighborhood shortly after the break-in was

reported. He was in a disheveled condition; grass and leaves were in his hair and clothing; he was scratched and perspiring heavily; he was wearing black underwear and carrying his shirt in his hand.

When stopped, defendant was asked to state his business in the neighborhood. His automobile had run out of gas, he said, and he was trying to find a filling station. But when the officers located his automobile near the residence where the break-in occurred, the gas tank was one-fourth full, and the motor started easily.

Even if I were able to accept the majority ruling that the identification of this defendant was tainted, which I certainly cannot, the error was harmless, and did not influence his conviction in the face of the overwhelming physical and circumstantial evidence which I have briefly outlined. La. Code Crim. Proc. art. 921.


OFF. 8
TEMPLIN
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MORGAN

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of December, 1973, three copies of the foregoing Petition for Writ of Certiorari were personally delivered to:

Maynard E. Cush
Attorney at Law
517 Slattery Building
Shreveport, Louisiana 71101

_____

Dan J. Grady III